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# Joint Tenancies, Severance and Professional Negligence

Dr Heather Conway\*

## Introduction

The right of survivorship inherent in every joint tenancy is only an effective estate planning device where each co-owner still wants their share to pass to the others on death. If this is no longer the case, some sort of severance mechanism has to be triggered, since it is trite law that survivorship cannot be defeated by a joint tenant attempting to will his/her interest in the property to someone else.<sup>1</sup>

Almost two decades ago, the English Court of Appeal in *Carr-Glynn v Frearsons*<sup>2</sup> held that a solicitor could be liable in negligence to an intended beneficiary under a will when the gift was ineffective because the property in question was held under a joint tenancy and the solicitor had failed to take steps to sever the joint tenancy as part of the will-making process- despite clear testamentary instructions from their client about who should inherit. This issue was revisited more recently in *Shah v Forsters LLP*<sup>3</sup> when the executors of the will of Mrs Christine Collins brought a professional negligence claim against Forsters LLP on the basis that her jointly owned assets passed to her husband, Mr Collins, instead of passing under the terms of Mrs Collins' will. However, the outcome in this case was very different.

## I. The Facts

Mr and Mrs Collins were married in March 1979, aged about forty and thirty respectively. There were no children of the marriage. The couple had sizeable assets, including shares in various companies, and two houses which they owned as legal and beneficial joint tenants: a London house, valued somewhere between £5-5.25 million, and a country home in Gloucestershire ('Broadwater House') worth just under £1 million. The latter property was at the centre of a dispute which Mr and Mrs Collins had with the National Trust, when it announced plans in 2005 to build a bird hide close to Broadwater House with disabled access adjacent to the boundary of the Collins' garden. The couple opposed the plan, with Mrs Collins playing a leading role in organising local resistance to the proposed development and writing numerous letters to the National Trust. Planning permission was eventually refused; but Mr and Mrs Collins, "both developed a deep-

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<sup>1</sup> A possible exception here being mutual wills: where all the joint tenants execute mutual wills, leaving their respective interests in the property to someone other than the remaining joint tenants, this can constitute a course of dealing severance in equity- *Re Wilford's Estate* (1879) LR 11 ChD 267.

<sup>2</sup> [1999] Ch 326.

<sup>3</sup> [2017] EWHC 2433 (Ch).

rooted antipathy to the [National Trust]"<sup>4</sup> as a result of its handling of the dispute, and despite the couple's previous support for the organisation.

In 2003, Mr Collins was diagnosed as suffering from dementia; his condition deteriorated significantly over the next few years, until he was sectioned in December 2007 following a violent attack on his wife. Mr Collins was subsequently admitted to a private care home, and the couple did not live together again.

Mr Collins' last will was dated 26 July 1990, and left his share of the London house to Mrs Collins; he also directed that the residue of his estate (which included his share in Broadwater House) would go to his wife for her lifetime, then to the National Trust absolutely. Mr Collins executed an Enduring Power of Attorney in favour of his wife, in July 2007. However, an attempt to execute a new will in September 2007 failed because Mr Collins lacked the requisite capacity; an application for a statutory will was made to the Court of Protection in October 2007, but was abandoned a couple of months later because Mrs Collins "objected to the extent of the enquiries then being made of her, at the behest of the Official Solicitor, and to the prospect that Mr Collins might have to be interviewed in connection with the application".<sup>5</sup>

Mrs Collins had expected to outlive Mr Collins, but was concerned about what would happen if she predeceased her husband and the prospect of the National Trust benefitting under her husband's will. In 2011, Mrs Collins retained the services of Forsters LLP, a firm of solicitors in London, to make what turned out to be her final will. Close friends gave evidence- which the court accepted- that Mrs Collins had "wanted to make sure that the National Trust did not 'get anything', and...to obtain advice about both the [London house and Broadwater House], and ascertain the benefits of severing the joint tenancies".<sup>6</sup> During discussions with the Forsters' solicitor at a meeting on 21 September 2011, Mrs Collins indicated that she wanted to make a new will, leaving her estate to various charities, and that she wanted the document to be prepared before she left for Australia the following month. According to the file note, the joint tenancies and the issue of severance were discussed at the meeting, with Mrs Collins being advised that- if she severed- she would not take the benefit of either property by survivorship if her husband died first (though it appears that the solicitor did not realise that Mr Collins' share of the London house would still pass to his wife under the terms of the 1990 will,

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<sup>4</sup> [2017] EWHC 2433 (Ch) at [23].

<sup>5</sup> [2017] EWHC 2433 (Ch) at [34].

<sup>6</sup> [2017] EWHC 2433 (Ch) at [46]. It is worth pointing out that, prior to this, Mrs Collins had taken steps to ensure that cash and shares held by Mr Collins were transferred to her; these amounted to a significant sum of money. Though this transaction was not relevant to the issue currently before the court, it was seen as highly questionable- see the discussion at [36]-[39].

which was part of a bundle of documents which Mrs Collins had supplied to Forsters in advance of the meeting). The possibility of carrying out a 'post-death severance' under s 142 of the Inheritance Tax Act 1984, in the event of Mrs Collins pre-deceasing her husband was also mentioned, though she was advised that this would be difficult to implement and outcomes were difficult to predict.<sup>7</sup> Further discussion on this (and several other issues) was to be left over to another meeting. The will was drafted, and signed by Mrs Collins on 28 September 2011. She also signed a letter of wishes which contained the following statement:

I have not severed the joint tenancies over the properties that I hold jointly with my husband, but should I predecease my husband I would like you to sever these joint tenancies retrospectively, if at all possible. This will ensure that my share of our properties is held beneficially by you and passes under my Will to my chosen beneficiaries. I would like you to take this action on the basis that my husband does not require my share of the properties in order to meet his needs.

There was no further material contact between Forsters and Mrs Collins, and she never arranged any follow-up meeting.

In April 2014, Mrs Collins was diagnosed with an aggressive form of cancer; she died the following month with her interests in both the London house and Broadwater house passing to her husband by survivorship.<sup>8</sup> Her executors subsequently brought an action against Forsters, arguing that it had acted negligently in failing properly to advise Mrs Collins on severing the joint tenancies of both properties as part of the will-making process.

## II. Competing Arguments

The executors, relying on *Carr-Glynn v Frearsons*,<sup>9</sup> submitted that Forsters had been under a duty to consider severance of the joint tenancies so that the deceased's testamentary wishes could be fulfilled, particularly in light of her hostility towards the National Trust. That particular duty was high, because Forsters were specialist private client lawyers.<sup>10</sup> Forsters had been in possession of a copy of Mr Collins' will; the solicitor had a duty to consider it before, during or after the meeting on 21 September 2011 and doing so would have revealed that Mrs Collins would not have been disadvantaged if she

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<sup>7</sup> Which is not a severance at all, but a variation carried out within two years of the person's death. Section 142 applies in Northern Ireland, and the tax fiction of severing a joint tenancy post death is dealt with in S Grattan, "'Deeds of Variation'- Some Frequently Asked Questions" (2011) 2 *Folio* 42.

<sup>8</sup> Mrs Collins did not take any steps to sever the joint tenancies after her cancer diagnosis.

<sup>9</sup> [1999] Ch 326.

<sup>10</sup> Citing the comments of Brightman J (as he then was) in *Bartlett v Barclays Bank Trust Company* [1980] Ch 515 at 534.

had severed the joint tenancy of the London house, though the position would have been different as regards Broadwater House. Severance could have been achieved by a simple written notice under s 36(2) of the Law of Property Act 1925.<sup>11</sup> The executors also argued that the letter of wishes “provided false comfort”,<sup>12</sup> because post-death severance was almost impossible to achieve and Mrs Collins’ wishes could easily have been accomplished by a lifetime severance. If correct advice had been given, Mrs Collins would have severed the joint tenancies.

Forsters distinguished the present case from *Carr-Glynn* on the basis that Mrs Collins had not evinced an intention to leave her share in the two properties to any particular beneficiary. Any duty which they owed to Mrs Collins was discharged by the fact she understood the relevant legal principles around severance, but decided not to sever and had communicated this to her lawyers. The fact that any potential post-death severance was a ‘long-shot’ had been communicated to her by the solicitor, and (having done so) there was no breach of duty.

### III. Decision

Sitting as a Deputy Judge, Mr Jeremy Cousins QC began by expressing his findings in relation to Mrs Collins, since her “personality, concerns, and motivations [were] central to the conclusions that [had] to be reached on the principal issues”.<sup>13</sup> She was an “intelligent woman” who had sat as a magistrate, “was experienced in instructing well-known firms of solicitors, and had played a significant part in the successful running of the companies” which she and her husband had major shareholdings in.<sup>14</sup> She was also “deeply attached to her husband” despite the difficulties caused by his illness, and had “confidently expected” to survive him right up to her diagnosis with cancer.<sup>15</sup> The Deputy Judge acknowledged that, given the extensive correspondence which had passed between Mrs Collins and various professional advisers, she “had no difficulty in grasping information that was provided to her”.<sup>16</sup> Having said all that:

Despite Mrs Collins’ quite forceful and determined personality, there was...also an indecisive side to her, that would cause her to procrastinate when it came to making decisions that she found difficult especially in relation to her husband.<sup>17</sup>

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<sup>11</sup> Exclusive to England and Wales.

<sup>12</sup> [2017] EWHC 2433 (Ch) at [68].

<sup>13</sup> [2017] EWHC 2433 (Ch) at [75].

<sup>14</sup> [2017] EWHC 2433 (Ch) at [76].

<sup>15</sup> [2017] EWHC 2433 (Ch) at [78].

<sup>16</sup> [2017] EWHC 2433 (Ch) at [79].

<sup>17</sup> [2017] EWHC 2433 (Ch) at [80].

Turning to the question of whether Forsters had breached its duty to Mrs Collins, the Deputy Judge reviewed the decision in *Carr-Glynn* and the need to ensure that effect was given to her testamentary intention. However, in the present case:

The important qualification...that affected the scope of the duty...was that Mrs Collins, once she got into the discussion of various possibilities including severance, non-severance, post-death severance, advantages and disadvantages of various courses, gave very clear instructions that apart from making her Will, and arranging for a Letter of Wishes including an instruction as to consideration of post-death severance, she wanted to leave other things over for discussion at another meeting.<sup>18</sup>

The Deputy Judge also accepted that, at some stage in the discussions between the Forsters' solicitor and Mrs Collins, she had said that she did not want to sever the joint tenancies. No breach of duty had occurred.

Addressing the causation issue (though not strictly necessary, given the absence of a breach of duty), the Deputy Judge drew attention to the fact that the executors had to show that, had Mrs Collins been properly advised, she would have acted differently and severed the joint tenancies. However, he was not satisfied that Mrs Collins would have acted any differently for various reasons, including: (i) the concept of severing a joint tenancy being familiar to her before she sought advice from Forsters; (ii) the possibility of severance and its effect being discussed at the September 2011 meeting, after which Mrs Collins gave "unequivocal instructions for the preservation of the status quo as joint tenants"; and (iii) the fact that "right up to the time of her death, Mrs Collins knew that she had not severed the joint tenancies, and the implications of this, [but] took no steps to effect such severance".<sup>19</sup>

In short, there had been no breach of duty on the part of Forsters; and, even if there had been, this was not the reason why Mrs Collins refrained from severing the joint tenancies of the two properties.

#### **IV. The Implications?**

The *Carr-Glynn* principle remains intact, and when advising clients who own assets as joint tenants, care should still be taken to explain fully the consequences of survivorship; and where a client no longer wishes their interest to pass to the surviving joint tenants on his/her death, appropriate steps should be taken to trigger a severance. However, the decision in *Shah v Forsters* at least makes it clear that, when both the effects of survivorship and the consequences of severance have been clearly explained to a client,

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<sup>18</sup> [2017] EWHC 2433 (Ch) at [84].

<sup>19</sup> [2017] EWHC 2433 (Ch) at [95].

and he/she declines to act or puts off a decision on severance until a later date, but goes ahead and executes a new will, the advising solicitor does not commit any breach of duty to their client (or any would-be beneficiary). And although the issue did not arise in *Shah*, even if the duty is breached, it still must be shown that the joint tenancy would have been severed 'but for' the advice given.

The decision also highlights the need to take appropriate (and prompt) action when a joint tenant is diagnosed with dementia or some other illness which might impair testamentary capacity. The old euphemism of 'putting one's affairs in order' includes reviewing previous wills, and updating these (where necessary) by making a new will while the individual is still able to do so. It seems inherently wrong- and rather lax- that Mr Collins' estate should pass under the terms of a document executed in 1990, and one wonders why his will had not been reviewed some time before his dementia diagnosis in 2003 (as would seem standard practice) or as a matter of urgency when the illness came to light.

All this could have been avoided in *Shah* had Mrs Collins acted differently and used the simple method of severance by notice in writing under s 36(2) of the Law of Property Act 1925.<sup>20</sup> Of course, this particular method is not available in Northern Ireland, though the NI Law Commission did propose that something similar be introduced as part of its land law reforms proposals back in 2010.<sup>21</sup> For the time being, this seems unlikely. So, in similar circumstances here, when one joint tenant lacks capacity and cannot execute a deed of severance,<sup>22</sup> some sort of unilateral severance will have to be carried out by the other joint tenant- effectively an *inter vivos* alienation by eg. leasing or mortgaging their interest in the property, or transferring it to a trustee to hold on trust for that same joint tenant who now becomes a tenant in common.<sup>23</sup> Such mechanisms may not be as straightforward as a notice of severance, but are an important means to an end in scenarios like this one.

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<sup>20</sup> While s 36(2) requires notice to be sent to the other joint tenant(s), Mrs Collins could have effected service by giving notice to herself by virtue of being her husband's attorney- *Quigley v Masterson* [2012] 1 All ER 1224.

<sup>21</sup> *Report on Land Law- NILC 8* (2010) p 34.

<sup>22</sup> And there isn't the shared consensus or ongoing pattern of behaviour involving all the joint tenants to establish equitable severance by mutual agreement or a course of dealing- see H Conway, *Co-Ownership of Land: Partition Actions and Remedies* (Bloomsbury Professional, 2<sup>nd</sup> edn, 2012), ch 13 (esp pp 452-457)

<sup>23</sup> Conway (n 22), p 448.